## YAYASAN TUANKU SYED SIRAJUDDIN v. HONG LEONG BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ADLIN ABDUL MAJID JC
[SUIT NO: WA-22NCC-371-08-2020]
4 AUGUST 2021

***CIVIL PROCEDURE:*** *Discovery – Production of documents – Whether requirements in O. 24 r. 12 of Rules of Court 2012 met – Whether production of documents necessary to dispose of matter fairly – Whether allowing production of documents unduly oppressive to defendant – Test of necessity – Whether met – Whether application qualified as fishing expedition – Whether court granted discretion to deal with documents in such manner as it thinks fit – Rules of Court 2012, O. 24 rr. 3, 7, 8, 12 & 13*

The plaintiff filed an application by way of encl. 59 for an order for the production of documents pursuant to O. 24 rr. 12 and 13 of the Rules of Court 2012 ('ROC'). The plaintiff, a non-profit charitable organisation, had an account with the defendant, where it maintained funds for charitable activities ('bank account'). The plaintiff and the defendant agreed that funds kept in the bank account were only to be paid out upon receipt of cheques bearing signatures of Abu Khalil Akasah ('trustee'), Tina Fadzlita Fadzil and another two directors and trustees. The official chequebook of the plaintiff was at all material times in the custody of Tina Fadzlita Fadzil. On 21 January 2017, it was discovered through a review of the plaintiff's monthly bank statements between 2009 and 2012 that a total of 417 cheques of the plaintiff had been unlawfully used to withdraw monies from the bank account by forgery of the trustee's signature. Documents bearing signatures of the trustee and 144 cheques of the plaintiff were then delivered to Jabatan Kimia Malaysia for examination. Upon comparison, it was found that the 144 cheques showed significant differences in handwriting characteristics from the specimen of the trustee's signature. The plaintiff filed an action in this court, claiming that the defendant had unlawfully, improperly and/or negligently paid out monies from the bank account upon receipt of the forged cheques. The plaintiff further claimed that the defendant had acted in breach of its duty of care owed to the plaintiff. On 11 November 2020, the plaintiff filed an application for discovery against the defendant, for 282 cheques from the total of 417, pursuant to O. 24 rr. 3 and 7 of the ROC ('discovery application'). The discovery application was allowed and an order for discovery was granted against the defendant ('discovery order'). The defendant complied with the discovery order. The affidavit verifying the list of documents specified that the defendant only had 41 physical cheques out of the 282 cheques, in its possession. The plaintiff inspected the 41 cheques, as per the discovery order, and took copies of the cheques. The plaintiff filed

this application for an order for the production of the 41 original physical cheques, pursuant to O. 24 rr. 12 and 13 of the ROC, which also included a prayer that the cheques, once produced, were to be sent for forensic examination by an expert and/or a document examiner, for the purpose of identifying fake signatures on the cheques.

**Held (allowing application):**

**(1)** The cheques in the custody of the defendant were relied on by the plaintiff (O. 24 r. 12(1)(a) of the ROC), could adversely affect the defendant's case or support the plaintiff's case (O. 24 r. 12(1)(b) of the ROC) and may lead to a series of inquiry resulting in the obtaining of information which may adversely affect the defendant's case or support the plaintiff's case (O. 24 r. 12(1)(c) of the ROC). Thus, the requirements in O. 24 r. 12(1) of the ROC have been met. (para 12)

**(2)** The plaintiff, who was seeking production of the cheques, had satisfied this court that the production was necessary to dispose of this matter fairly. The cheques are to be produced for the purpose of submission for forensic examination. The original and physical copies are required to ensure accurate results from the forensic examination, which would assist this court to determine a pertinent question during the trial of this matter, namely whether the cheques are forged, and were unlawfully or negligently authorised by the defendant. In this regard, allowing the production of the cheques would not be unduly oppressive to the defendant. Whether or not the cheques were forged (which could be conclusively determined with the production of the cheques and submission to a forensic examiner) would be a material issue affecting the defendants' defence. (para 15)

**(3)** The test of necessity would have been met with the granting of the discovery order. The discovery application, which was made pursuant to O. 24 rr. 3 and 7 of the ROC would have had to meet the test of necessity under O. 24 r. 8. The test of necessity in O. 24 r. 13 is identical to the test in O. 24 r. 8. With the grant of the discovery order, the test under O. 24 r. 8 would have been met, and it followed that the test in O. 24 r. 13 would also have been met. If the cheques were not produced, the plaintiff would suffer an unfair disadvantage in its attempt to prove its case against the defendant. As the plaintiff had identified the exact documents which were subject to production, namely the 41 cheques, this application would not qualify as a fishing expedition. (para 15)

**(4)** Order 24 r. 12(2) of the ROC should be interpreted as a two-step process, in that firstly, documents may be ordered to be produced, and secondly, once produced, they may be dealt with in such manner as the court thinks fit. The term 'produce' could not stand on its own because

the purpose of the documents being produced (for example for forensic examination), must surely follow from the production of the documents. For this reason, O. 24 r. 12(2) of the ROC granted the court discretion to deal with the documents "... in such manner as it thinks fit", once the documents have been produced. (para 18)

**Case(s) referred to:**

*Alliance Management SA v. Pendleton Lane P & Another And Another Suit [2007] 4 SLR 343* ***(refd)***

*Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Dato' Kam Woon Wah & Ors [2018] 1 LNS 1600 HC* ***(refd)***

*Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40* ***(refd)***

*Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75* ***(refd)***

**Legislation referred to:**

Rules of Court 2012, O. 24 rr. 3, 7, 8, 9, 12(1)(a), (b), (c), (2), 13, O. 40 r. 1(1)

Rules of Court (Cap 322) [Sing], O. 24 r. 12

*For the plaintiff - Deenasini Sathasivam & Simerpreet Kaur; M/s Mohanadass Partnership*
*For the defendant - Shaikh Abdul Saleem; M/s Shaikh David & Co*

*Reported by Suhainah Wahiduddin*

**JUDGMENT**
**(Encl. 59)**

**Adlin Abdul Majid JC:**

**Introduction**

**[1]** The plaintiff filed an application by way of encl. 59, for an order for the production of documents pursuant to O. 24 rr. 12 and 13 of the Rules of Court 2012 ("ROC").

**[2]** I allowed the application. The reasons for my decision are as set out below.

**Background Facts**

**[3]** The plaintiff is a non-profit charitable organisation. It has an account with the defendant, where it maintains funds for charitable activities ("bank account").

**[4]** The plaintiff and the defendant agreed that funds kept in the bank account are only to be paid out upon receipt of cheques bearing signatures of Abu Khalil bin Akasah ("trustee"), Tina Fadzlita binti Fadzil and another two directors and trustees of the plaintiff. The official chequebook of the plaintiff was at all material times in the custody of Tina Fadzlita binti Fadzil.

**[5]** On 21 January 2017, it was discovered through a review of the plaintiff's monthly bank statements between the years 2009 and 2012 that a total of 417 cheques of the plaintiff had been unlawfully used to withdraw monies from the bank account by forgery of the trustee's signature. One hundred forty four cheques of the plaintiff and documents bearing signatures of the trustee were then delivered to Jabatan Kimia Malaysia for examination. Upon comparison, it was found that the 144 cheques showed significant differences in handwriting characteristics from the specimen of the trustee's signature.

**[6]** The plaintiff filed an action in this court, claiming that the defendant had unlawfully, improperly and/or negligently paid out monies from the bank account upon receipt of the forged cheques. The plaintiff further claimed that the defendant had acted in breach of its duty of care owed to the plaintiff.

**[7]** On 11 November 2020, the plaintiff filed an application for discovery against the defendant, for 282 cheques from the total of 417, pursuant to O. 24 rr. 3 and 7 of the ROC ("discovery application"). The discovery application was allowed and an order for discovery dated 13 January 2021 was granted against the defendant ("discovery order"). By the discovery order, the defendant was ordered to do the following:

(i) make and serve on the plaintiff a list of all cheques in Annexure A of the discovery application, which are or have been in the possession, custody, or power of the defendant;

(ii) file an affidavit verifying the list, and serve a copy of the affidavit on the plaintiff; and

(iii) serve a notice on the plaintiff pursuant to O. 24 rr. 7 and 9 of the ROC, stating a time and place within seven days after service at which the plaintiff shall be allowed to inspect the cheques referred to in the list.

**[8]** The defendant complied with the discovery order. The affidavit verifying the list of documents specified that the defendant only had 41 physical cheques out of the 282 cheques, in its possession. The plaintiff's solicitors inspected the 41 cheques, as per the discovery order, and took copies of the cheques.

**[9]** The plaintiff filed this application in encl. 59, for an order for the production of the 41 original physical cheques, pursuant to O. 24 rr. 12 and 13 of the ROC. Enclosure 59 also included a prayer that the cheques, once produced, are to be sent for forensic examination by an expert and/or a document examiner, for the purpose of identifying fake signatures on the cheques.

## Considerations

*The Relevant Provisions On Discovery*

**[10]** I shall first consider the provisions which encl. 59 relies on, namely O. 24 rr. 12 and 13 of the ROC. The relevant provisions are as follows:

> **12. Order for production to Court**
>
> (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:
>
> (a) **documents on which the party relies or will rely;**
>
> (b) documents which could:
>
> (i) **adversely affect a party's case; or**
>
> (ii) **support a party's case; and**
>
> (c) documents which **may lead to a series of inquiry resulting in the obtaining of information** which may:
>
> (i) **adversely affect a party's case; or**
>
> (ii) **support a party's case.**
>
> (2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) **in such manner as it thinks fit.**
>
> **13. Production to be ordered only if necessary**
>
> (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that **the order is necessary either for disposing fairly of the cause or matter or for saving costs.**
>
> (2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid. (emphasis added)

*Requirements In O. 24 r. 12(1) Of The ROC*

**[11]** Before going into the application of the above provisions to the present case, it is important to understand the plaintiff's case against the defendant. The plaintiff's claim is that the defendant had unlawfully, improperly and/or negligently paid out monies from the bank account upon receipt of forged cheques. The plaintiff further claimed that the defendant had acted in breach of its duty of care owed to the plaintiff, by failing to exercise reasonable care and skill to ensure the authenticity of signatures on the cheques; failing to act in conformity with the standard of an ordinary, reasonable and prudent banker; and failing to verify payments made.

**[12]** From the above, I am of the view that the requirements in O. 24 r. 12(1) of the ROC have been met. This is because the cheques in the custody of the defendant:

(i) are relied on by the plaintiff (O. 24 r. 12(1)(a));

(ii) could adversely affect the defendant's case or support the plaintiff's case (O. 24 r. 12(1)(b)); and

(iii) may lead to a series of inquiry resulting in the obtaining of information which may adversely affect the defendant's case or support the plaintiff's case (O. 24 r. 12(1)(c)).

*The Necessity Test*

**[13]** Further, O. 24 r. 13 of the ROC must also be considered. The provision states that an order for the production of documents can only be made if the order is necessary either for disposing fairly of a cause or matter or for saving costs.

**[14]** On the test of necessity, the following passages in the judgment of the Court of Appeal in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 are relevant:

> Under r. 13(1) an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. *It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r. 13(1) per Parker LJ in Dolling-Baker v. Marrett & Ors* [1991] 2 All ER 890 and *Ventouris v. Mountain* [1991] 1 WLR 607.
>
> And in considering the application the court should bear in mind the words of Sir Thomas Bingham MR in *Taylor v. Anderton [1995] 1 WLR 447 at p 462 that 'the purpose of the rule is to ensure that one party does not enjoy an advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection.'*
>
> *Finally the court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery* – see *Leslie S Holmes v. Engineering Service Inc* [1993] 1 AMR 27 at p 36.
>
> (emphasis added)

**[15]** Guided by the test laid out by the Court of Appeal, my findings are as follows:

(i) The plaintiff, who is seeking production of the cheques, has satisfied this court that the production is necessary to dispose of this matter fairly. The cheques are to be produced for the purpose of submission for

forensic examination. The original and physical copies are required to ensure accurate results from the forensic examination, which would assist this court to determine a pertinent question during the trial of this matter, namely whether the cheques are forged, and were unlawfully or negligently authorised by the defendant.

(ii) In this regard, allowing the production of the cheques would not be unduly oppressive to the defendant. Whether or not the cheques are forged (which can be conclusively determined with the production of the cheques and submission to a forensic examiner) would be a material issue affecting the defendant's defence.

(iii) The test of necessity would have been met with the grant of the discovery order. The discovery application, which was made pursuant to O. 24 rr. 3 and 7 of the ROC would have had to meet the test of necessity under O. 24 r. 8. The test of necessity in O. 24 r. 13 is identical to the test in O. 24 r. 8. With the grant of the discovery order, the test under O. 24 r. 8 would have been met, and it follows that the test in O. 24 r. 13 would also have been met.

(iv) If the cheques are not produced, the plaintiff would suffer an unfair disadvantage in its attempt to prove its case against the defendant.

(v) This application would not qualify as a fishing expedition. Learned counsel for the plaintiff, Ms. Deenasini Sathasivam referred to *Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75, on what would constitute a fishing expedition. The Singapore High Court held that a fishing expedition in the context of discovery refers to "… the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a "fishing expedition" …". In this case, I am of the view that as the plaintiff had identified the exact documents which are subject to production, namely the 41 cheques, encl. 59 would not be a fishing expedition.

*Discretion Of The Court Under O. 24 r. 12(2)*

**[16]** I now move on to the powers of the court under O. 24 r. 12(2), to "… deal with the documents when produced in pursuance of an order made under para. (1) in such manner as it thinks fit."

**[17]** Learned counsel for the defendant, Encik Shaikh Abdul Saleem argued that O. 24 r. 12 of the ROC does not allow the court to order a forensic examination to be conducted on the subject documents. He cited *Dato' Sri Andrew Kam Tai Yeow v. Tan Sri Dato' Kam Woon Wah & Ors* [2018] 1 LNS 1600; [2018] MLJU 1470, where Wong Kian Kheong J held that:

A O. 24 r. 12(1) RC only confers a discretionary power on the Court to order a "production" (not a forensic examination) of documents to the Court. Order 24 r. 12(2) RC also gives a discretion to the Court to "deal"' with documents produced pursuant to a Production Order and does not empower the Court to order a forensic examination of those documents.

B **[18]** *Dato' Sri Andrew Kam Tai Yeow* interpreted the term "produce" in O. 24 r. 12(2) in a narrow manner, and excluded forensic investigation of documents from the scope of the production of documents. I do not think that O. 24 r. 12(2) should be interpreted in such a narrow manner. My view is that O. 24 r. 12(2) should be interpreted as a two-step process, in that firstly, documents may be ordered to be produced, and secondly, once produced, C they may be dealt with in such manner as the court thinks fit. The term "produce" cannot stand on its own because the purpose of the documents being produced (for example for forensic examination), must surely follow from the production of the documents. It is for this reason that O. 24 r. 12(2) granted the court discretion to deal with the documents "… in such manner D as it thinks fit", once the documents have been produced.

**[19]** The Singapore High Court in *Alliance Management SA v. Pendleton Lane P & Another And Another Suit* [2007] 4 SLR 343 also adopted a wider interpretation of O. 24 r. 12 of the Singapore Rules of Court (Cap 322, R 5, 2006 Rev Ed), which is similar to O. 24 r. 12 of the ROC. The court E explained its discretionary power under the aforesaid rule in the following passages:

> … From the language of r. 12(1), the words "produce to the Court" in relation to the specified documents (including material stored on the Hard Disk) in the possession, custody or power of the opposite party must be F for the overall purpose of carrying into effect the provisions of rr. 1 and 5 and, hence, *should be given a wider and not a literal interpretation. In principle, r. 12(1) is capable of wider application.* Allied to that is the court's discretion to redirect production. Rule 12(1) can apply here when the court wants to incorporate safeguards to protect the integrity of the Hard Disk and G the confidentiality of the defendants to the documents stored on the Hard Disk. To this extent, the court does not, as a matter of practicality, convenience and discretion, require the Hard Disk to be handed over directly to the court. The computer expert appointed as part of the safeguards will be the best person to have the Hard Disk (see [35] below). As Mr Bull correctly stated, the return of the Hard Disk to the Judicial H Manager was premised on the Hard Disk belonging to OTN and, hence, the order for its return to the Judicial Manager was justified. *Order 24 r. 12(2) gives the court the unfettered power to deal with the Hard Disk "in such manner as it thinks fit" and that sub-rule fits in with the wider interpretation given to r. 12(1). In this context, and in the light of the provisions of O. 24 r. 13, a fair disposal of the cause or matter was best served by the AR's order for the Hard Disk* I *to be produced and returned to the Judicial Manager.* (emphasis added)

**[20]** Counsel for the defendant further argued that the power to subject documents that have been produced for forensic examination can only come under O. 40 r. 1 of the ROC. I find this argument to be misconceived. Order 40 of the ROC relates to the appointment of an expert witness by the court and does not expressly make reference to documentation. Order 24 r. 12 on the other hand specifically refers to the production of documents. These two orders address two different things, and using one would not preclude the other's application. In other words, the appointment of an expert may be done by way of O. 40 r. 1(1), but this order does not limit the exercise of the court's discretion under O. 24 r. 12(2). In a situation where documents are to be produced, as with the present case, O. 24 r. 12(2) applies. If the defendant's argument that O. 40 r. 1(1) is the correct order to invoke (and not O. 24 r. 12), it will result in the plaintiff being able to only appoint a forensic examiner but without access to the original cheques that are the subject matter of the examination.

**Decision**

**[21]** Based on the considerations set out above, I allowed the prayers in encl. 59, for the 41 physical cheques in the possession, custody and/or power of the defendant to be produced to the court, following which the cheques are to then be produced for forensic examination for the purpose of identifying fake signatures on the cheques. Costs of RM5,000 were awarded to the plaintiff.